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Supreme Court, U.S.
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No. 03-1398

In the
Supreme Court of the United States

EUGENE CRUM, JR., et al.,
Petitioners,

v.

THOMAS G. FLOWERS, et al.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS THOMAS G. FLOWERS, ET AL.

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May 7, 2004

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QUESTION PRESENTED

(Restated)

Whether, on the facts presented, the court of appeals correctly held that petitioners lacked standing to appeal the adverse judgment of the district court because petitioners were not parties to the underlying action?

PARTIES TO THE PROCEEDINGS BELOW

In order to identify accurately the parties to the proceedings below, a preliminary explanation of those proceedings is required.

The style of the case set forth in the petition – *Crum v. Flowers* – is inaccurate and misleading. Petitioners are individual members of a putative (but as yet uncertified) plaintiff class in a pending private discrimination lawsuit commenced in 1994 and styled *Crum v. Alabama*, Civ. A. No. 94-T-356-N (M.D. Ala.). Respondents are defendants in an altogether separate enforcement proceeding commenced by the United States in 1968 and styled *United States v. Flowers*, Civ. A. No. 68-T-2709-N (M.D. Ala.) (previously styled and herein referred to as *United States v. Frazer*[1]). When the court of appeals entered the judgment order that is the basis of the present petition, petitioners (that is, the *Crum* plaintiffs) were neither parties to nor intervenors in *Frazer*; rather, they were strangers to *Frazer* whose lone formal act in that case had been to file the motion for contempt sanctions that underlies this appeal.

The status of the parties in the court below is as follows:

The plaintiff in the proceedings below, *United States v. Frazer*, is the United States.

Petitioners, who described themselves as "Interested Parties-Appellants" in the *Frazer* proceedings, include the following individuals and entities: Charles E. Archie, Jr.; Carolyn Ball; Carol Banks; David Barley; John Bradford; Milton Burton; Pauline Burton; Lynn Carter; Clyde Chatman; Preston Coleman; Betty Crum;

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[1] Although *United States v. Frazer* has been re-styled *United States v. Flowers* as a result of substitutions of the named defendants, respondents will refer to the case herein as the "*Frazer* case" or "*Frazer*."

Eugene Crum, Jr.; Grant Culliver; Jerome F. Dangerfield; Ethelene Duster; Venus Edwards; Mable G. Elliott; Andrey D. Finch; Samuel Foster; Lewis Gilchrist; Freddy Golthy; Terry Dale Goodson; Ricky Grider; Romanza A. Hamilton; Willie Harris; Michael Hopkins; Jacquelyn J. Jackson-Kelly; Yvonne C. Jennings; Gladys Jones; Theodore Jones; Willie Kelley; Deborah F. Lumpkin; Katherine Matthews; Roosevelt Mays, Jr.; Shirley Mays; Eddie G. McCoy; Robert E. Moore; Benny Newton; Herman Powell; Samuel L. Price; Pamela Ramos; Kenneth Rodgers; David Said; Geneice Smith; Robert L. Smith; Wanda Jackson Speights; Thornton Taylor; Ellen Tolbert; Earl Vaughn; Nonie Williams; John W. Winston; Tamblyn Witherspoon; Darrell Wright; Earnest Wright; and a putative class of black persons who are employed, have been employed, or who may in the future be employed by the State of Alabama and its agencies, boards, commissions and officials, the Florence/ Lauderdale County Emergency Management Agency, Lauderdale County, and the Lauderdale County Commission.

The respondents are as follows: State of Alabama, and its agencies, boards, commissions, and officials including Alcoholic Beverage Control Board; Board of Public Accountancy; Bureau of Tourism and Travel; Commission on Aging; Commission on Physical Fitness; Department of Agriculture and Industries; Department of Conservation and Natural Resources; Department of Corrections; Department of Economics and Community Affairs; Department of Education; Department of Finance; Department of Human Resources; Department of Industrial Relations; Department of Labor; Department of Mental Health and Mental Retardation; Department of Public Health; Department of Rehabilitation Services; Department of Revenue; Department of Voter Registration; Development Office; Emergency Management Agency; Thomas G. Flowers; Florence/ Lauderdale County Emergency Management Agency; Industrial Development Training Agency; Labor Board;

Lauderdale County; Lauderdale County Commission; Medicaid Agency; Retirement Systems of Alabama; Securities Commission; State Board of Registrars; State Docks; State Personnel Board; State Personnel Department.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI SEEKING SUMMARY REVERSAL

Respondents oppose the petition for a writ of certiorari to reverse summarily the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW AND JURISDICTION

The court of appeals' judgment order dismissing petitioners' appeal for lack of standing (Pet. App. 1a) is unpublished. The court of appeals' order to show cause why the appeal should not be dismissed for lack of standing (Pet. App. 20a-21a) is unpublished. The district court's order denying petitioners' motion for contempt sanctions (Pet. App. 2a-19a) is published at 213 F.R.D. 592 (M.D. Ala. 2003). The Court has jurisdiction under 28 U.S.C. §1254.

RELEVANT STATUTORY PROVISION

Title 28, Section 1291 of the United States Code provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

STATEMENT OF THE CASE

The tortured procedural history of this case, which is described in some detail below, does not lend itself to a brief or succinct recitation. However, for purposes of providing a preliminary frame of reference, that history, reduced to its most basic and necessary components, is as follows:

The current petition – somewhat misleadingly styled *Crum v. Flowers* – actually arises from two entirely separate lawsuits: The first, *Frazer* (now *Flowers*), is an enforcement action filed by the United States in 1968 against the State of Alabama and many of its agencies;

the second, *Crum*, is a private discrimination lawsuit commenced by petitioners in 1994 on behalf of a putative (but still uncertified) class of African-Americans against the State of Alabama and many of its agencies. Confusion arises because petitioners, who are the *Crum* plaintiffs but are not parties of record in *Frazer*, filed a motion for contempt sanctions in *Frazer* alleging that respondents had violated the *Frazer* injunctions. The district court, which has presided over both *Crum* and *Frazer* since their (separate) inceptions, denied petitioners' motion because, as nonparties, they lacked standing to enforce the *Frazer* injunctions. Petitioners appealed the district court's order to the Eleventh Circuit, which dismissed the appeal for lack of standing. It is that decision of the court of appeals that is the subject of the instant petition for certiorari.

I. The Underlying Litigation

A. The *Frazer* Enforcement Action

In 1968, the United States commenced the underlying action, *United States v. Frazer*, Civ. A. No. 68-T-2709-N (M.D. Ala.), against the State of Alabama and many of its boards, agencies, departments, and officials, alleging that they had engaged in racially discriminatory employment practices. In 1970, after a non-jury trial, the district court found in favor of the United States and entered an injunction prohibiting the State and its agencies from "engaging in any employment practices, including recruitment, examination, appointment, training, promotion, retention, or any other personnel action, for the purpose of or with the effect of discriminating against any employee, or actual or potential applicant for employment on the ground of race or color." *United States v. Frazer*, 317 F. Supp. 1079, 1090 (M.D. Ala. 1970).[2]

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[2] In a subsequent proceeding, the court entered additional injunctive relief. *See United States v. Frazer*, No. 68-T-2709-N, 1976

Contrary to the petition's dramatic and sometimes inflammatory rhetoric,[3] this case does not concern the segregated South of the 1950s. By all accounts, the State has made tremendous progress regarding the hiring and promotion of African-American candidates, as well as other employment practices, since the issuance of the first *Frazer* injunction in 1970. The *Frazer* court has not found the State in violation of the injunctions in over 20 years; on the contrary, as early as 1982 the district court noted the State's "progress in providing equal employment opportunities in merit system positions to black citizens of Alabama." *Frazer/Ballard* Order at 2 (June 29, 1982). Perhaps most tellingly, even the original *Frazer* plaintiff, the United States, which has monitored compliance with the *Frazer* injunctions during the 34 years of their existence, has emphasized the State's progress. The United States recently joined the State of Alabama in moving the district court to terminate certain specific mandates of the *Frazer* injunctions based on its determination that the discriminatory practices that had initially required the implementation of a so-called "no-bypass" rule[4] have ceased and that the effects of such practices have been remedied. (Accordingly, while petitioners are technically correct that the *Frazer* injunction "remains in effect today," Pet. at 2, that assertion – without any reference to the United States' recent efforts to lift important parts of that injunction – tells only part of the story.)

The State of Alabama, of course, does not claim to

WL 729 (M.D. Ala. Aug. 20, 1976). The 1970 and 1976 injunctions are collectively referred to as the "*Frazer* injunctions."

[3] The petition, for instance, refers to the "document[ation]" of the State's "ongoing refusal to comply" with court orders but cites only 28- and 34-year-old court decisions as support. Pet. at 1.

[4] The "no-bypass" rule refers to a core provision of the *Frazer* injunction prohibiting an appointing authority from selecting a lower-ranking white candidate over a higher-ranking African-American candidate from the list of eligible candidates for a given position.

have successfully rooted out every last vestige of individual discrimination; that is and will remain an ongoing effort. But recognition of the State's substantial progress both by the court in which *Frazer* has been pending for 34 years and by the original party plaintiff to that action belies petitioners' dramatic descriptions of allegedly unaddressed and rampant race discrimination.

B. The *Crum* Lawsuit

Petitioners, who are individual plaintiffs in a separate private lawsuit, *Crum v. Alabama*, Civ. A. No. 94-T-356-N (M.D. Ala.), are African-Americans claiming that they have suffered discrimination at the hands of the State of Alabama, its agencies, departments, subdivisions, and individual and official agents. Many of the *Crum* defendants are also defendants in *Frazer*. Contrary to the petition's representation (Pet. at 2), petitioners are *not* members of a "class" in *Crum*, and, indeed, no plaintiff class has been certified in that case. To the contrary, on June 21, 2001, the district court denied petitioners' motion for class certification in *Crum*. *See* Order Denying Plaintiffs' Motion for Class Certification With Leave To Renew (June 21, 2001).[5]

In 1997, over the State's objection, for reasons of convenience and judicial economy, the district court consolidated the *Frazer* and *Crum* cases "to the extent that there are issues common to both." Order Regarding Consolidation at 1 (Sept. 17, 1997). The consolidation did not of its own force make petitioners parties to the *Frazer* case or its injunctions. *See Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933) ("[C]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single

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[5] Although the district court's June 21, 2001, order denying petitioners' motion for class certification granted them leave to renew their motion at a later date, the district court has not certified a plaintiff class or conducted a class certification hearing, and no hearing date is currently set.

cause, or change the rights of the parties, or make those who are parties in one suit parties in another."); *see also Farese v. Scherer*, 342 F.3d 1223, 1228 (11th Cir. 2003) (citing *Johnson*). Furthermore, several years later, the district court for all practical purposes deconsolidated the two cases when it dismissed from the *Crum* litigation all of petitioners' claims based on alleged violations of the *Frazer* injunctions (although, to be fair, it did so "without prejudice to the rights of an appropriate person or entity to file a motion for contempt"[6]). Thus, in sum, petitioners did not become parties to *Frazer* via the limited initial consolidation of *Frazer* and *Crum*, and any suggestion to the contrary was rebutted when the district court dismissed the *Frazer* claims that petitioners had asserted in the *Crum* litigation.

On the same day the district court effectively deconsolidated the two cases, and without seeking to intervene in the underlying *Frazer* litigation, petitioners filed in both *Crum* and *Frazer* a consolidated motion seeking contempt sanctions. *See* Motion To Show Cause Why Defendants Should Not Be Held in Contempt of Court (Apr. 5, 2001).[7] This consolidated motion (the beginning of petitioners' attempt to hybridize the *Crum* and *Frazer* cases, which culminates in the confusing *Crum v. Flowers* style of this case) sought an order requiring the State in both actions to show cause why it should not be held in contempt of the *Frazer* injunctions. Petitioners' contempt motion purported to be based on Federal Rule of Civil Procedure 71, which provides in pertinent part: "When an order is made in favor of a

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[6] Order Regarding Dispositive Motions at 2 (Apr. 5, 2001).

[7] Only recently – on February 26, 2004 – did the district court grant petitioners the right to intervene in *Frazer*. *See* Order Regarding Intervention (Feb. 26, 2004). A subsequent discovery order limited the scope of the litigation in intervention to the question whether the no-bypass rule should be terminated, as both the State of Alabama and the United States argued it should. *See* Discovery Order at 4-5 (Apr. 7, 2004).

person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party ...." In their responses to the consolidated motion, both the State of Alabama and the United States argued that Rule 71 did not apply and that petitioners lacked standing to enforce the *Frazer* injunctions in either the *Crum* or *Frazer* cases.

On June 19, 2001, the district court entered a joint order denying petitioners' contempt motion in the *Crum* and *Frazer* cases "[f]or essentially the reasons given by the United States in its statement filed on May 8, 2001," that is, because Rule 71 did not apply and petitioners lacked standing to enforce the *Frazer* injunctions. Order Denying Motion for Civil Contempt at 1 (June 19, 2001). On July 2, 2001, Petitioners filed a motion to alter, amend, or reconsider the district court's order. The district court denied that motion, with opinion, on March 28, 2003. Pet. App. 2a-19a.

C. Proceedings in the Eleventh Circuit

Presumably because they had sought contempt sanctions against the State in a consolidated motion filed in both *Crum* and *Frazer*, petitioners also filed a consolidated notice of appeal in both cases on April 28, 2003. On May 28, 2003, the court of appeals issued an order regarding the consolidated appeal in which it raised an issue concerning the court's appellate jurisdiction, in particular, "[w]hether the district court's March 28, 2003, order denying plaintiffs' motion to alter, amend or reconsider the court's prior order denying the plaintiffs' motion for contempt is immediately appealable." Jurisdictional Question (May 28, 2003). At this juncture in the litigation, the Eleventh Circuit restored the *Crum* and *Frazer* cases to their appropriately separate paths.

With respect to *Crum*, on October 24, 2003, after briefing by the parties, the Eleventh Circuit dismissed petitioners' appeal of the district court's March 28, 2003, judgment for lack of jurisdiction, finding that the subject order was not final. *See* Order Dismissing Appeal at 2

(Oct. 24, 2003). On March 11, 2004, petitioners sought permission to appeal the district court's March 28 order interlocutorily pursuant to 28 U.S.C. §1292(b) in the context of both the *Crum* and *Frazer* cases. On April 12, 2004, the court of appeals denied petitioners' request. *See* Order Dismissing Petition To Appeal at 2 (Apr. 12, 2004). The court of appeals' rulings in the *Crum* litigation are not before this Court.

With respect to *Frazer* – at issue here – on October 24, 2003, the Eleventh Circuit issued an order requiring petitioners to show cause why the appeal should not be dismissed for lack of standing. Pet. App. 20a-21a. After receiving the parties' briefs,[8] the court of appeals issued a one-line unpublished judgment order dismissing petitioners' appeal in *Frazer* for lack of standing: "As Appellants are not parties to the *U.S. v.* [*Frazer*] litigation, this appeal is DISMISSED for lack of

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[8] Petitioners' assertion that respondents "did not contest the standing of petitioners to appeal" in the Eleventh Circuit (Pet. at 4) is inaccurate. Respondents expressly argued there that petitioners' "appeal should be dismissed." Resp. C.A. Br. 14. To be sure, "for purposes of [their] response" to the Eleventh Circuit, respondents were willing to "assume" that "if Rule 71 applied and the Crum Plaintiffs otherwise had standing to file their contempt motion, they also should be regarded as having standing to appeal." *Id.* at 4. Respondents made that "assum[ption]," however, only because they pressed a different, alternative argument – namely, that because petitioners, as plaintiffs in *Crum*, lacked standing to move the district court for contempt sanctions against respondents in the *Frazer* litigation in the first place, they also had no standing to appeal in *Frazer*. *See id.* ("[T]he district court's standing and Rule 71 analysis should apply equally to the [appellate standing] issue raised by this Court's jurisdictional question.").

In any event, it is established that the issue of standing is not subject to waiver and that an appellate court is required to address the issue without regard to how (or whether) the issue was raised below. *See* Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); *see also United States v. Hays*, 515 U.S. 737, 742 (1995); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990).

standing." Pet. App. 1a.

From that unpublished judgment order, petitioners on April 5, 2004, sought the instant writ of certiorari from this Court.

REASONS FOR DENYING THE WRIT

Before diving into the merits of petitioners' arguments, two important preliminary observations are in order. *First*, petitioners' second "Question Presented" – a discussion of which actually occupies the better part of the petition (Pet. at 10-16) – is not really presented at all. That question, and the whole of Part II of the petition, concerns the meaning and scope of Federal Rule of Civil Procedure 71 – namely, whether Rule 71 permits unnamed non-party beneficiaries of a court order to enforce the order through contempt sanctions or otherwise. *That* question, petitioners contend, has divided the circuits and warrants this Court's review. But, as petitioners rightly concede (Pet. at 10), *that* question is not presented here. The Eleventh Circuit did not address Rule 71 – and, indeed, one of the chief reasons petitioners seek summary reversal of the Eleventh Circuit's judgment (of which more below) is to "force" that court to weigh in on what petitioners view as the real issue here. Pet. at 5.

Second, with respect to the only issue that really *is* presented here – whether the Eleventh Circuit was correct to dismiss petitioners' appeal on standing grounds – petitioners have essentially (and, again, correctly) acknowledged that it involves no "certworthy" question. Conspicuously, petitioners have not asked the Court to grant certiorari and set this case for briefing and argument. Instead, petitioners have sought only the extraordinary remedy of summary reversal. *See* Pet. at 5, 6, 10, 16.

Petitioners seek summary reversal on the ground, they say, that the Eleventh Circuit's decision denying

their standing to appeal – embodied in a one-line unpublished judgment order – "directly contravenes Supreme Court precedent." Pet. at 6. With respect, petitioners are wrong. The court of appeals followed settled law in dismissing petitioners' appeal for lack of standing. In particular, the decision below is consistent with the general principle, embraced by this Court's holdings, that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment.

As petitioners themselves correctly recognize (Pet. at 10), summary reversal is reserved for "demonstrably erroneous application[s] of federal law." *Maryland v. Dyson*, 527 U.S. 465, 467 n.1 (1999). For the reasons explained below, the Eleventh Circuit's decision is not erroneous, let alone "demonstrably erroneous." Accordingly, and because by petitioners' own admission there is no basis for granting certiorari and setting the case for briefing, this Court should simply deny the petition.

Summary Reversal Is Unwarranted In This Case Because The Court of Appeals Followed Settled Law In Dismissing Petitioners' Appeal For Lack of Standing.

Again, the Eleventh Circuit did not say anything one way or the other about the meaning, scope, or application of Rule 71. Instead that court's one-line unpublished judgment order dismissed petitioners' appeal on the sole basis that they were not parties to the underlying litigation and therefore lacked standing to appeal the district court's judgment: "As Appellants are not parties to the *U.S. v.* [*Frazer*] litigation, this appeal is DISMISSED for lack of standing." Pet. App. 1a. The court of appeals' judgment is consistent with the principle, as articulated by this Court, "that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988). *See also United States ex rel. Louisiana*

v. Jack, 244 U.S. 397, 402 (1917); Fed. R. App. P. 3(c) ("A notice of appeal must ... specify the *party* or *parties* taking the appeal.") (emphasis added); Restatement (Second) of Judgments § 34(1) (1980) ("A person who is named as a party to an action and subjected to jurisdiction of the court is a party to the action.").

1. *Marino v. Ortiz*, 484 U.S. 301 – which petitioners relegate to a footnote (Pet. at 9 n.4) – is for all intents and purposes on point here. The Court there addressed the issue whether police officers who were not parties to a Title VII lawsuit against the City of New York could challenge a consent decree settling that suit. Although the officers had objected to the settlement at the fairness hearing, they had not formally moved to intervene. This Court affirmed the Second Circuit's decision that "because petitioners were not parties to the underlying lawsuit, and because they failed to intervene for purposes of appeal, they may not appeal from the consent decree approving that lawsuit's settlement." *Id.* at 304. In so holding, the Court reiterated and built upon the long-standing rule that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Id.*

The same result – that is, no standing to appeal – follows here. When the district court entered its order in the instant case (March 28, 2003), petitioners were not parties to the underlying *Frazer* litigation and had not sought to intervene in that action. Nor had petitioners intervened in the *Frazer* litigation for any purpose as of the date they filed their notice of appeal from the district court's judgment (April 28, 2003), or even as of the date the Eleventh Circuit dismissed their appeal (December 5, 2003).[9] Instead, at all relevant times petitioners were

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[9] Later (on February 26, 2004), petitioners were permitted to intervene in *Frazer*. *See supra* at 5 n.7. But it is well-established that an individual's standing to appeal turns on his status before the district court at the time the challenged judgment was entered. *See*

merely putative class members in an altogether separate discrimination case (*i.e.*, *Crum*) pending before the same district court. The United States – not petitioners or their privies – commenced the underlying enforcement action (*i.e.*, *Frazer*) in 1968 and remained the sole named party-plaintiff for 34 years.

Under the rule of *Marino v. Ortiz*, petitioners, as legal strangers to the *Frazer* litigation, lacked standing to appeal.

2. Petitioners argue that *Devlin v. Scardelletti*, 536 U.S. 1 (2002), requires a different result. More accurately, petitioners assert that *Devlin* so clearly requires a different result that it was "demonstrably erroneous" for the Eleventh Circuit to follow *Marino* and that summary reversal is thus warranted. Again, petitioners are wrong. *Devlin*, which as explained below dealt specifically with the mandatory class-action context, is distinguishable; this Court's decision in *Marino* remains controlling law with respect to non-class cases like this one.

In *Devlin*, a class of retired pension-plan participants attempted to prevent the trustees of the plan from eliminating a cost-of-living adjustment. 536 U.S. at 4. After objecting to a settlement between the class and the adverse parties, one absent class member attempted to appeal the trial court's approval of the settlement. *Id.* at 4-6. The court of appeals held that because the absent

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Credit Francais Int'l, S.A. v. Bio-Vita, Ltd., 78 F.3d 698, 704 (1st Cir. 1996) (citing, *e.g.*, 9 Moore's Federal Practice ¶203.16 (2d ed. 1991)); *I.C.C. v. Holmes Transp. Inc.*, 983 F.2d 1122, 1125 n. 4 (1st Cir. 1993). Typically, this means that the party appealing must have been a party of record at the time the judgment was entered, including by way of intervention, substitution, or third-party practice. *See Matter of VMS Ltd. P'ship Sec. Litig.*, 976 F.2d 362, 366 (7th Cir. 1992) (citing Moore's); *see also Hispanic Soc. of New York City Police Dep't Inc. v. New York City Police Dep't*, 806 F.2d 1147, 1152 (2d Cir. 1986).

class member was not technically a party to the action he could not appeal the trial court's ruling. *Id.* at 6.

In reversing, this Court emphasized the peculiarities of mandatory class-action litigation. Citing Federal Rule of Civil Procedure 23(b)(1), the Court stressed that "petitioner had no ability to opt out of the settlement," *id.* at 10, and given that fact concluded that "[t]he District Court's approval of the settlement – which binds petitioner as a member of the class – amounted to a 'final decision of [petitioner's] right or claim' sufficient to trigger his right to appeal," *id.* at 9 (quoting *Williams v. Morgan*, 111 U.S. 684, 699 (1884)). In the same vein, this Court reiterated:

> What is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement. It is this feature of class action litigation that requires that class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing. To hold otherwise would deprive nonnamed class members of the power to preserve their own interests in a settlement that will ultimately bind them, despite their expressed objections before the trial court.

Id. at 10.

What the face of this Court's opinion makes plain is that *Devlin* fundamentally concerns the rights of unnamed class members. Indeed, this Court granted certiorari in *Devlin* expressly to "resolve a disagreement among the Circuits as to whether *nonnamed class members* who fail to properly intervene may bring an appeal of the approval of the settlement." *Id.* at 6 (emphasis added). In answer to that question, the Court "h[e]ld that *nonnamed class members* like petitioner who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening." *Id.* at 14

(emphasis added). And notably, in the course of arriving at that answer, the Court emphasized both various "aspect[s] of class action procedure" as well as the "goals of class action litigation," *id.* at 9-10, and went on to distinguish *Marino* specifically on the ground the would-be appellants there "were not members of the class." *Id.* at 9. *See also, e.g., Devlin*, 536 U.S. at 3 ("nonnamed member of the class"), 7 ("member of the retiree class"); 7 ("member of the class bound by the judgment"), 9 ("member of the class"), 10 ("class members"), 10 ("nonnamed class members").

Devlin's emphasis on the specifics of class-action procedure has not gone unnoticed by lower courts. Indeed, at least one court has held that *Devlin* applies only to mandatory class actions, *see Ballard v. Advance Am.*, 79 S.W.3d 835, 837 (Ark. 2002), and another has suggested as much in dicta, *see In re General American Life Ins. Co.*, 302 F.3d 799, 800 (8th Cir. 2002). Of course, the *Frazer* case from which the instant petition arises is not a mandatory class action. Indeed, contrary to petitioners' misleading suggestion (*see supra* at 4), *Frazer* is not a class action at all. It is an enforcement action commenced by the United States primarily to vindicate public rather than private interests. Because petitioners are not class members in any underlying class action, they are not "bound" in any relevant sense – *i.e.*, in the *Devlin* sense – by anything a court may say or do in the *Frazer* litigation. *Devlin* simply does not apply. *Cf. Devlin*, 536 U.S. at 16 n.1 (Scalia, J., dissenting) ("Not even petitioner ... is willing to advance the novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation *before the class is certified.*").

3. A further indication of petitioners' misunderstanding of *Devlin* is *AAL High Yield Bond Fund v. Deloitte & Touche LLP*, 361 F.3d 1305 (11th Cir. 2004). In *AAL*, which petitioners do not mention, the Eleventh Circuit rejected a reading of *Devlin* not unlike the one petitioners press here. Just months before filing a

petition for bankruptcy, Just for Feet ("JFF"), a shoe retailer, sold $200 million in corporate notes to two institutional buyers. *Id.* at 1307. The buyers commenced a securities class action against JFF's officers, the underwriter of the note offering, and an outside auditor. *Id.* The officers and the buyers agreed to settle the dispute. The district court preliminarily approved the settlement and, after hearing and overruling the objections to the settlement by the auditor and the underwriter (collectively, the "objectors"), entered an order certifying the class and approving the settlement. *Id.* Given their participation in the note offering, the district court excluded the objectors from the plaintiff class before certification. *Id.* Among other things, the objectors appealed the district court's order excluding them from the plaintiff class. *Id.* at 1308.

On appeal, the Eleventh Circuit squarely addressed the issue whether the objectors, who were excluded from the class before certification and settlement, could appeal the denial of their objections to the certification and settlement without intervening in the action. *Id.* Relying on this Court's decision in *Marino*, the court held that because the objectors were not parties to the lawsuit they "could only appeal the denial of their objections to the class settlement if they had intervened in the action," which they had not. *Id.* at 1309.

Importantly for present purposes, the court expressly rejected the objectors' expansive reading of *Devlin*. In particular, the court noted that "*Devlin* held that nonnamed members of class actions who have timely objected to a class settlement may appeal the denial of their objections without first moving to intervene." *Id.* (citing *Devlin*, 536 U.S. at 14). After noting that the issue framed by the *Devlin* court concerned whether the unnamed class member qualified as a "party" for purposes of Fed. R. App. P. 3(c), the court found that the objectors had "misse[d] the point" of *Devlin*:

> The Objectors first argue that *Devlin* permits their appeal because they could have or should have been included in the plaintiff class. The argument misses the point of *Devlin*, which was to allow appeals by parties who are actually bound by a judgment, not parties who merely could have been bound by the judgment. Persons who are not class members are not bound at all.

361 F.3d at 1309-10 (citations omitted). The court held that it "need[ed] not determine the precise breadth of *Devlin* to see that the Objectors clearly stretch it too far." *Id.* at 1311.

The facts of the instant case are even further afield of *Devlin* because (i) the underlying *Frazer* case is not a class action, and (ii) unlike the objectors in *AAL*, petitioners have not participated in any meaningful way in the *Frazer* proceedings and, indeed, save for their contempt motion, are strangers to the *Frazer* litigation. As stated by the *AAL* court, *Devlin's* import is that it recognizes an appeal right in nonparties *who actually are bound by a judgment of the district court*, as in the case of unnamed class members in a mandatory class-action proceeding, who are bound by operation of law by a case's final disposition. The unnamed class-member objectors in *Devlin* needed a right to appeal because (i) they were bound by court approval of the class settlement and (ii) the named class representatives, whose interests lay in preserving the settlement, could not adequately represent the objectors' interests. *Devlin*, 536 U.S. at 9-10.

Again, non-class actions, like the case at bar, simply do not share these peculiar features of class-action practice. Petitioners, as legal strangers to *Frazer*, are not bound by the *Frazer* injunctions. The court of appeals in *AAL*, like the *Ballard* and *General American* courts before it (*see supra* at 13), correctly recognized the limitations of *Devlin*. *Devlin* is not controlling here – and in light of *Ballard*, *General American*, and *AAL*, certainly not so

obviously controlling as to warrant summary reversal. The petition should be denied.

4. Petitioners also assert that, whatever their relation (or lack thereof) to the *Frazer* litigation, they have an absolute right to appeal the district court's order disposing of "their own motion" for contempt sanctions in *Frazer*. Pet. at 6, 8. In support of that assertion, petitioners cite this Court's decisions in *Blossom v. Milwaukee & Chicago R.R. Co.*, 68 U.S. (1 Wall.) 655 (1863), *Hinckley v. Gilman, Clinton & Springfield R.R. Co.*, 94 U.S. 467 (1876), and *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988).

But those cases, too, are distinguishable. None of those decisions involved an appellant who was for all intents and purposes a legal stranger to the underlying litigation. *Blossom* allowed a bidder for property at a foreclosure sale, who was not a named party to the underlying foreclosure action itself, to appeal a district court's denial of his request to compel the sale. In so doing, the Court likened the bidder's interest in the underlying action to that of a surety, a receiver, or a creditor with a claim to a common fund, all of whom, the Court indicated, had a sufficient stake in the underlying suit to justify appeal. 68 U.S. (1 Wall.) at 656. *Hinckley*, likewise, involved an appeal by an individual who, though not technically a named party to a foreclosure action, had been appointed receiver in that action and, in that capacity, had been ordered by name to pay money into the court. 94 U.S. at 469. And *Catholic Conference* permitted a group of witnesses who had been, but were no longer, named parties to a case to appeal contempt orders against them for refusing to answer subpoenas directed to them in the underlying litigation. 487 U.S. at 75-76.

Petitioners here – who, to reiterate, are the *Crum* plaintiffs – are differently situated. Apart from lobbing in their own motion for contempt sanctions, petitioners have not participated in the district court proceedings in

Frazer, which, again, is not a private lawsuit but an enforcement action brought and directed throughout its existence by the named party-plaintiff, the United States. Despite the seeming factual similarities between *Frazer* and *Crum* (*e.g.*, overlapping defendants, legal issues), petitioners' legal interest in *Frazer* is not direct, but is at most incidental.

Petitioners' lax approach to standing – that any person, no matter how distant his relation to the underlying litigation, has an absolute right to appeal the disposition of any motion he may file in that litigation – surely proves too much. It would throw wide open the gates to random, oddball – and worse, malicious – filings. There is certainly no principle inherent in petitioners' position that would limit its application to non-parties who just so happen to be involved in a factually similar (though separate) proceeding, or to such a non-party's request for contempt sanctions. Rather, petitioners' absolute rule would permit any person, no matter how alien to the case and how bizarre his motion, to interject himself into trial proceedings and then, when disappointed with the trial court's disposition of one of his filings, to compound the congestion of the judicial system by seeking review in the court of appeals. In sum, petitioners' position, which would unleash untold motions and appeals by nonparty bystanders and sideline-sitters, presents a very real Pandora's-box problem.[10]

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[10] Appeals of denials of formal motions to intervene, upon which petitioners seek to rely in support of a broader appeal right (Pet. at 9), present a special circumstance. By moving to intervene in a case, a non-party seeks to affiliate himself formally (and appropriately) with a trial proceeding, and thereby to subject himself to the rules and burdens applicable to parties of record. The would-be intervenor, who demonstrates his commitment to the litigation he seeks to join, should have appellate review of his effort to affiliate. Again, as of the time their motion for contempt sanctions was denied, petitioners (who have only since been permitted to intervene, *see supra* at 5 n.7) were differently situated. They were legal strangers to the *Frazer* litigation,

5. There is one final point. The petition implicitly suggests that if this Court does not grant the writ and summarily reverse, petitioners' opportunity to raise – and this Court's opportunity to address – the underlying Rule 71 issue will be forever lost. That is not the case. Petitioners have invoked Rule 71 as a means of enforcing the *Frazer* injunction not only in this case (*i.e.*, *Frazer*) but also in their own case, *Crum*. While the Eleventh Circuit recently denied petitioners' attempt to appeal the Rule 71 issue interlocutorily in *Crum* (*see supra* at 6-7), it has not definitively resolved that issue one way or the other. The issue remains open and, as the named plaintiffs in *Crum*, petitioners have the right to appeal the district court's Rule 71 decision upon final disposition of that case pursuant to 28 U.S.C. §1291. Following the Eleventh Circuit's decision of the Rule 71 issue in *Crum*, petitioners may of course seek this Court's review.

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whose only formal involvement had been to lob in a single motion from the sidelines.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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